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No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI* COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the diversion of water containing pollutants through a man-made point source from one distinct body of water to another requires a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, where the diverted water containing the pollutants would not have entered the receiving water but for the diversion.

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INTEREST OF *AMICI*

The Commonwealth of Pennsylvania, Department of Environmental Protection, (Department or Commonwealth) respectfully submits this brief [1] in support of Respondents Miccosukee Tribe of Indians, *et al.* *Amici* Commonwealth urges that the Court affirm the Eleventh Circuit's decision holding that the Clean Water Act (the "Act") requires an NPDES permit where a "point source" discharges water

[1] This Brief was prepared by the Pennsylvania Office of General Counsel on behalf of the Department, and it is submitted with the written consent of the parties. Rule 37(2) and (6) of the Supreme Court Rules. Sup. Ct. R. 37(2) and (6).

containing pollutants from one distinct body of water to another in circumstances where, as here, the pollutants would not have entered or affected the receiving body of water but for the operation of the point source, even though the point source is not the original source of the pollutants. *See Miccosukee Tribe of Indians et al. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002). The NPDES permit program provides a flexible, efficient, enforceable and necessary means to protect the water quality and related uses of Pennsylvania's waters from impairment or pollution. A contrary interpretation of the Act will leave largely unregulated the human-induced transfer of lower-quality water, or water with significantly different biological, chemical or physical attributes, into higher-quality receiving waters, and will create a significant gap in the Commonwealth's authority to protect and maintain the quality of its waters under the Act.

In 1986, the Pennsylvania Courts held that Pennsylvania's approved NPDES permitting program was applicable to the interbasin diversion of water containing pollutants from one body of water to another. Since 1986, the Department has routinely applied its NPDES permit program to diversions of such water from one distinct body of water to another and has developed a formal guidance document for use in applying these NPDES permitting requirements that provide needed environmental protection. The regulated community in Pennsylvania has routinely complied with the applicable NPDES requirements relating to such diversions. The Department seeks to maintain its full scope of authority to regulate, through the Act, numerous situations which could potentially have an adverse impact on the quality of a receiving body of water such as: the transfer of salt water into fresh water basins; the conveyance of water infested with invasive species (*e.g.*, zebra mussels) into a body of water that is not; the pumping of warm, sediment-laden lake water into a higher-altitude, high quality trout stream with cold and

clear water; and the man-induced drainage of collected waters containing high levels of polluted runoff, including phosphorus, into separate and sensitive watersheds.

The Department has examined and classified each surface water body within its boundaries to establish its "designated uses" (*e.g.*, aquatic life, water supply, recreation, fish consumption, and special protection). 25 Pa. Code §§ 93.3, 93.9 and 93.9a-93.9z. The Department has promulgated water quality criteria that specify maximum pollutant levels, as well as narrative descriptions of water conditions, necessary for a body of water to achieve the most critical use for which it has been designated. 25 Pa. Code §§ 93.6-93.8. The Department has issued thousands of NPDES permits that contain pollutant limitations designed to protect designated uses and maintain the quality of the specific body of water into which pollutants are discharged.

Given these extensive efforts, the Department has a significant ongoing interest in assuring that its finely-tuned programs developed to assess, protect, and improve the water quality of each surface water body within its borders are not frustrated by an incongruous interpretation of the Act that constrains State authority to control the transfer of pollutants from lower-quality to higher-quality waters through the NPDES permitting process. To allow the wholesale human-induced mixing of waters with significantly different chemical, biological or physical attributes to escape the Act's permit requirements will undermine the Act's comprehensive approach to protecting and improving the Commonwealth's surface waters.

The Department also has a strong interest in maintaining the full strength of the Act's permit requirement so as to ensure a strong "national floor" of water quality controls. These national requirements, supervised by EPA, prevent States from relaxing their own standards and enforcement efforts in an attempt to gain a perceived economic or market

advantage in the siting of industrial, commercial or other facilities at the economic or environmental expense of other States. Moreover, because watersheds do not respect political boundaries, downstream States have a strong interest in protecting their water bodies against the transfer of pollutants originating in upstream States. Under the Act, downstream states have the ability to participate and advocate within NPDES permit processes in matters concerning pollutant discharges proposed in upstream States. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision that an NPDES permit is required for a diversion of water, containing pollutants, from one distinct body of water to another through a point source is consistent not only with the Clean Water Act, but also with longstanding Pennsylvania case law and practice. Pennsylvania case law requires an NPDES permit where a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of water into which it would not have otherwise flowed. That point source is the cause-in-fact of the discharge of pollutants, and, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs triggering the NPDES permit requirement.

The Department has for the past seventeen years applied its NPDES permitting program to diversions of surface water containing pollutants from one body of water to another. The Department requires an NPDES permit and evaluates the adverse impacts of a proposed diversion to provide necessary protection to the water quality and designated uses of Pennsylvania's surface waters.

The analysis for evaluating the applicability of the NPDES permit program to dams and dam-induced water quality changes that Petitioners attempt to use in this case is distinguishable from the case before the Court. Outside of the dam context, various Courts of Appeal have consistently held that an interbasin transfer of water containing pollutants through a point source requires an NPDES permit.

The NPDES permitting program provides a flexible, efficient, enforceable and necessary means to protect the water quality and designated uses of surface waters. Since 1986, Pennsylvania has not experienced any of the litany of problems that Petitioner and its Amici Curiae predict. The NPDES permit program authorizes the use of general permits that can be issued quickly without significant administrative burden, and many of the NPDES permits also authorize the use of Best Management Practices (BMP's) in place of more traditional numeric effluent limitations in appropriate situations. The NPDES permit program also expressly authorizes compliance schedules where a permittee needs additional time to achieve compliance. An NPDES permit provides an effective and enforceable means to protect water quality that is lacking under Florida state law that is subject to change.

An independent basis to affirm the Eleventh Circuit exists under the unique facts of this case. To allow human habitation in a portion of the Everglades within the C-11 Basin, a drainage canal system, levees and a pump drained a portion of the Everglades. The drainage canal system, levees and pump maintain the water levels below historic levels by channeling and collecting runoff and related seepage from adjoining areas where water levels are maintained at higher levels. EPA's NPDES regulations define "discharge of a pollutant" (triggering an NPDES permit requirement) as including "surface runoff collected or channeled by man."

The unique facts of this case fit within this regulatory definition, and an NPDES permit is therefore required under EPA's regulations.

ARGUMENT

I. ELEVENTH CIRCUIT CORRECTLY DECIDED THAT A DIVERSION OF WATER CONTAINING POLLUTANTS FROM ONE DISTINCT WATER BODY TO ANOTHER REQUIRES AN NPDES PERMIT.

The Clean Water Act prohibits the discharge of pollutants from a point source without an NPDES permit. 33 U.S.C. §§ 1311, 1342. The term "discharge of a pollutant" is defined by statute as " . . .any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12)(A). The Eleventh Circuit correctly applied these requirements and decided that a diversion of water containing pollutants from one distinct water body to another requires an NPDES permit. *Miccosukee Tribe*, 280 F.3d at 1368-1369.

The underlying facts in this case, which are not in dispute, support the Eleventh Circuit's decision. *Miccosukee Tribe*, 28 F.3d at 1366-1367; Petitioner's Brief at pages 5-17; and United States' Brief at pages 6-12. The Petitioner (South Florida Management District or SFWMD) is the local sponsor of the Army Corps of Engineers (Corps) Central and Southern Florida Project (CCSF Project), a vast system of levees, canals, water impoundments and other water control structures. SFWMD operates these water control facilities in southern Florida, which has unique hydrologic characteristics. The dispute in this case arises from SFWMD's operation of water control facilities that are part of the CCSF Project. These facilities channel, collect and transport "excess" or "accumulated" water from the C-11 Basin through the C-11 (drainage) Canal that drains an area that was once part of the Everglades. The "excess" or "accumulated" water is runoff

from the C-11 Basin and seepage from the neighboring WCA-3A area where the water levels are maintained at higher levels. SFWMD discharges the "excess" or "accumulated" water from the C-11 (drainage) Canal by means of the S-9 Pump which discharges over the C-33 and C-37 levees, into WCA-3A. This pumped discharge contains excessive levels of phosphorus, a pollutant, that adversely affects the water quality of WCA-3A. Without the S-9 Pump that discharges water from the C-11 (drainage) Canal, the C-11 Basin could flood within days. Without the S-9 Pump, the runoff in the C-11 (drainage) Canal would not discharge into the WCA-3A.

In the decision below, the Eleventh Circuit found that the parties agreed that the S-9 Pump was a point source, that the pumped discharge contains pollutants (phosphorus) and that the C-11 (drainage) Canal and the WCA-3A are navigable waters under the Clean Water Act. *Miccosukee Tribe*, 280 F.3d at 1367. The parties also agree that the discharge of the pollutants is adversely affecting the WCA-3A. The parties disagree on one legal issue: "whether the pumping of already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." *Miccosukee Tribe*, 28 F.3d at 1367. (italics in original).

The Eleventh Circuit correctly held that "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs." *Miccosukee Tribe*, 280 F.3d at 1368-1369. (italics in original) Thus, an interbasin diversion of surface water containing pollutants by means of a point source is subject to NPDES permitting.

A. Dams and water diversions within a single water body are not implicated by the Eleventh Circuit Decision.

Several of the Amici (who support the Petitioner) erroneously assert that the Eleventh Circuit decision in this case affects dams and water diversions within a single water body.[2] The decision of the Eleventh Circuit does not affect dams or the natural flow of water within a single water body. The decision recognized EPA's longstanding position on "dams and dam induced water quality changes" that was given deference in earlier decisions,[3] but it concluded:

> We know of no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station. The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less Chevron deference.

Miccosukee Tribe, 280 F.3d at 1367, n. 4 (italics in original). Thus, the Eleventh Circuit Court of Appeals decision merely refused to extend EPA's policy on dams and dam-induced water quality changes to the S-9 Pump discharge from the C-11 (drainage) Canal. The *Miccosukee Tribe* decision does not affect or implicate EPA's policy concerning dams and dam-induced water quality changes that occur within a single body of water.

There is no basis to extend EPA's dams and dam-induced water quality changes policy in this case. EPA's longstanding dam policy provides that an NPDES permit is not required for dams or dam-induced water quality changes because the changes to water quality are caused by the dam.

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[2] Brief of Amici City of New York *et al* at page 13.

[3] *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir. 1988).

National Wildlife Federation v. Gorsuch, 693 F.2d at 165-170, *National Wildlife Federation v. Consumer Power*, 862 F.2d at 585, 587. The inherent nature of dams and impounded water cause the water quality changes and these changes, induced or caused by the dam, do not constitute the "addition of a pollutant" under EPA's policy. EPA's policy concerning dams and dam-induced water quality changes is not applicable here because the changes in water quality in WCA-3A, increased levels of the pollutant phosphorus, are not caused by the C-11 (drainage) Canal. The C-11 (drainage) Canal collects and channels the drainage, but it does not cause the phosphorus as would be the case with dam-induced or caused water quality changes that EPA addressed in its Policy.

Outside the dams and dam-induced water quality changes context, various Courts of Appeals have consistently held that interbasin transfers of water containing pollutants through a point source require an NPDES permit. *Miccosukee Tribe*, 280 F.3d at 1366-69; *Catskill Mountain Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 489-94 (2nd Cir. 2001); *DuBois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1269-99 (1st Cir. 1996); *See also Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155 (9th Cir. 2003) (discharge of unaltered groundwater from coal bed methane operations required NPDES permits). This Court does not have to reach the issue of EPA's policy relating to dams and dam-induced water quality changes to address the issue in this case because this case does not involve a dam or dam-induced water quality changes.

B. Petitioner and United States have radically different positions on the issue before the Court.

The United States in its Brief supports the Eleventh Circuit rejection of the Petitioner's resurrection of the argument that

"pollutants are added" from a point source only if the point source is the origin of the pollutants. United States' Brief at 21. As the United States correctly states, this argument was rejected more than 20 years ago, and Petitioner now is attempting to resurrect this extreme position. United States' Brief at 21. Under Petitioner's approach, a discharge of a pollutant requiring an NPDES permit occurs only "when the pollutant *originates* from this point source, not when pollutants originating elsewhere are merely passed through." Petitioner's Brief at 26-27 (emphasis added). This extreme position has been rejected by the federal courts for more than 20 years, is opposed by the United States and is inconsistent with EPA's regulation that defines the term "discharge of pollutant" at 40 CFR § 122.2 (". . . term includes surface runoff collected and channeled by man."). This position would also severely handicap efforts to regulate publicly owned treatment works and municipal separate storm sewer systems (MS-4) as the United States correctly noted. *See* United States' Brief at 22, n. 6. This Court should reject this extreme position suggested by Petitioner.

The "unified waters" position of the United States is equally as extreme and objectionable and should also be rejected. Under the United States' view, which it failed to share with the Eleventh Circuit below, there is a single "unified waters of the United States." After a pollutant is discharged into one part of the "unified waters of the United States," the water containing the pollutants can be diverted into any other part of the "unified waters of the United States" without triggering any obligation to secure an NPDES permit. This approach jeopardizes the water quality and protected uses of distinct water bodies[4] and would allow the

[4] In Pennsylvania, protected water uses are applied to streams and stream segments. 25 Pa. Code §§ 93.9, 93.9a-93.9z. The distinct uses of individual streams and stream segments deserve protection that will be lost under the United States' "unified waters of the United States" approach.

diversion and mixing of water with significantly different chemical, biological or physical characteristics without the necessary protection of an NPDES permit to protect water quality and stream uses.

The Eleventh Circuit decision correctly imposes the requirement to obtain an NPDES permit that protects water quality and stream uses where a man-made point source changes the natural flow of a body of water and causes it to discharge into another distinct body of water into which it would not have otherwise flowed.

II. NPDES PERMIT PROGRAM ENABLES PENNSYLVANIA TO PROTECT SURFACE WATERS FROM INTERBASIN DIVERSIONS CONTAINING POLLUTANTS THAT MAY DESTROY OR IMPAIR DESIGNATED USES AND CAUSE POLLUTION.

A. Since 1986 Pennsylvania has applied its NPDES permit program to interbasin diversions.

Since 1986, the Department has applied its NPDES permitting program in Pennsylvania to interbasin surface water diversions of water containing pollutants from one body of water to another. In 1986, the Pennsylvania Commonwealth Court held the Department had the duty and authority to require an NPDES permit for a diversion of water from the Delaware River to the East Branch of the Perkiomen Creek and North Branch of the Neshaminy Creek. *DelAWARE Unlimited v. DER*, 508 A.2d 348 (Pa. Cmwlth. 1986). The Department continues to routinely apply its NPDES permitting program to interbasin diversions.

In *Del-AWARE*, a citizens group challenged certain permits issued to a power company and several municipalities authorizing a diversion project that supplied water from the Delaware River to public water systems for use as drinking water and to a nuclear power station for use as noncontact cooling water. The matter was initially adjudicated before the Pennsylvania Environmental Hearing Board (Board). The Board upheld the Department's decision, in part, to issue the permits, how-ever, it remanded the matter to the Department ordering it to require an NPDES permit for the diversion of the water from the Delaware River to the North Branch Neshaminy and East Branch Perkiomen Creek. *Del-AWARE*, 508 A.2d at 359.

The power company appealed this remanded aspect of the Board's decision to the Pennsylvania Commonwealth Court.[5] The Pennsylvania Commonwealth Court upheld the Board on this issue and directed the power company to obtain an NPDES permit for its diversion of water from the Delaware River to the East Branch of Perkiomen Creek. *Del-AWARE*, 508 A.2d at 360. The Pennsylvania Commonwealth Court held that the diversion in that case constituted a point source requiring an NPDES permit. It distinguished *National Wildlife Federation v. Gorsuch*, and concluded that:

> "PECO relies on *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), which held that water released from a particular dam to a stream below was not from a "point source." However, *National Wildlife Federation* is distinguishable because it dealt with water diversion within a single body of water, whereas here water will be diverted from one body of water (the Delaware River) to another (the East Branch). Unlike *National Wildlife Federation*, "addition from a point source occurs [because] the point source itself

[5] The power company's diversion of water from the Delaware River was discharged in the East Branch of the Perkiomen Creek.

> physically introduces a pollutant into the water from the outside world."

Del-AWARE, 508 A.2d at 359 *citing National Wildlife Federation v. Gorsuch*, 693 F.2d at 175. In sum, the Pennsylvania Commonwealth Court concluded that a water diversion within a single body of water did not require an NPDES permit whereas water containing pollutants diverted from one body of water to another requires a NPDES permit.

This distinction also forms the basis for the Pennsylvania Commonwealth Court's rejection of the power company's argument that the interbasin diversion was a nonpoint source discharge under 33 U.S.C. § 1314(f)(2)(F).[6] The Pennsylvania Commonwealth Court decided that the power company's interbasin diversion "is not a flow diversion changing the "movement, flow or circulation" of East Branch Perkiomen Creek, as would a dam levee, channel or causeway, but one introducing water from a separate basin into the East Branch Perkiomen Creek through a "discernible, confined and discrete conveyance": a "pipe." *Del-AWARE*, 508 A.2d at 359, n. 39. The Pennsylvania Commonwealth Court limited the scope of Section 1314(f)(2)(F) of the CWA to changes in the movement, flow or circulation of water within a single body of water. Thus, the longstanding decision of the Pennsylvania Commonwealth Court is consistent with the recent decision of the Eleventh Circuit Court of Appeals in this case.

[6] Section 1314(f)(2)(F) provides: "The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including . . . (2) processes, procedures, and methods to control pollution resulting from . . . (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways or flow diversion facilities."

B. The Department has adopted a formal policy for permitting surface water diversions to guide its efforts in applying NPDES Permit requirements.

Several Amici supporting the Petitioner labor under the mistaken understanding that no state currently requires an NPDES permit for surface water diversions between two distinct water bodies. Brief of the City of New York et al. at page 6. In Pennsylvania, NPDES permits are routinely required for such surface water diversions. The Department routinely follows the rules announced in the *Del-AWARE* decision as evidenced by the formal Technical Guidance that the Department developed and implements. The document is entitled "Policy for Permitting Surface Water Diversion."[7] The Policy states that it "results from a Pennsylvania Commonwealth Court Decision in *Del-AWARE Unlimited et al v. Department of Environmental Resources et al*, 508 A.2d 348 (1986) . . . ruling that the diversion of water from one body of water to another requires a NPDES permit." Policy at page 2.

In Pennsylvania, water users may, with proper authorization,[8] divert water from one body of water to another for ultimate use for any number of purposes. The Policy

[7] All of the Department's formal Technical Guidances are available at its website at www.dep.state.pa.us at the Department's Public Participation Center web-page, and the Policy for Permitting Surface Water Diversion is a Bureau of Water Quality Technical Guidance and is available at the following link. http://www.dep.state.pa.us/eps/docs/cab200149b1126000/fldr200149e0051190/fldr20026l91459089/doc20026l939520ce/362-2000-003.pdf.

[8] The Department issues various permits to authorize such diversions that are described in the identified Policy. In addition, in roughly two-thirds of the Commonwealth, the Delaware and Susquehanna River Basin Commissions also regulate the diversion of water, 32 P.S. § 815.101 and 32 P.S. § 820.1.

describes how the Department uses NPDES permits to protect the water quality and uses of both the diverted and receiving streams. The Department will not authorize a diversion if the diversion from the diverted water body or the discharge to the receiving water body will cause impairment or destruction of the designated uses of either water body.

The Policy recognizes that an interbasin diversion is different from a typical situation requiring an NPDES permit where the discharger has direct control over the volume of the discharge and the levels of pollutants being discharged. In a diversion, the quality of the water being diverted is affected by a variety of naturally occurring and man-induced conditions that are not under the direct control of the diverter. While the Department evaluates the public benefits associated with a diversion versus the potential environmental impacts, the Department is primarily concerned with insuring that the diversion does not cause a violation of state water quality standards in the receiving waters.

As the Policy describes, Pennsylvania's federally approved water quality standards encompass designated water uses and water quality criteria necessary to protect those uses, as well as special protection or antidegradation requirements. Policy at page 9. To ensure protection of the water quality standards, the Department evaluates the expected water quality impact of a diversion by reviewing the available long-term water quality data for both the diverted and receiving streams. Policy at page 10. In its evaluation of the receiving stream, the Department determines if the discharge will have an adverse impact using appropriate modeling techniques. If there are no anticipated adverse impacts then the discharge can be approved. If there are anticipated adverse impacts to the water quality standards then the Department will establish technology-based effluent limitations or other Best Management Practices (BMP's) to prevent the adverse impacts. Policy at page 11.

The NPDES permit program provides Pennsylvania with the necessary permitting tool to protect the water quality and designated uses of streams that could otherwise be impaired or destroyed from a diversion of water.

C. NPDES Permit Program provides a flexible, efficient and effective means to regulate interbasin surface water diversions.

The Petitioner and several Amici have mistakenly asserted that the NPDES permitting program is a costly, time-consuming, burdensome and bureaucratic program that will "wreak havoc."[9] These unsupported claims are not accurate and are highly speculative. Pennsylvania's actual experience with its NPDES program, in regulating interbasin transfers between different water bodies and in regulating other categories, is different, and it establishes that the NPDES program provides a flexible, efficient and effective means to protect water quality and stream uses.

Pennsylvania has not experienced any of the litany of problems that Petitioner and others mistakenly predict. In addition, the NPDES permit program contains several key elements that will enable states to provide effective, efficient and ultimately enforceable NPDES permit coverage.

General permits are authorized in the NPDES permit program for categories of discharges that qualify for general permit coverage. 40 C.F.R. §§ 122.28 and 123.25; 25 Pa. Code §§ 92.81-92.83. General permits can be issued relatively quickly with a minimum of paperwork and administrative burden. Pennsylvania has, in fact, used general permits for numerous categories of discharges such as Concentrated Animal Feeding Operations (CAFO) (PAG-12), 30 Pa.B. 3122 (June 17, 2000), Stormwater Associated with Construction Activities (Phase I and II) (PAG-2), 32 Pa.B.

[9] Petitioner's Brief at 4.

6000 (December 7, 2002), and municipal separate storm sewer systems (MS-4)(PAG-13), 32 Pa.B. 5999 (December 7, 2002)[10]. These general permits and others (that EPA has approved) belie Petitioner's argument. Any state which is concerned about administrative burdens could use a general permit to significantly reduce permit review timeframes and administrative burdens in appropriate situations.

In addition, the Department recognizes that appropriate Best Management Practices (BMPs) may be used in appropriate circumstances as effluent limitations in NPDES permits in place of numerical effluent limitations in both individual and general permits. BMPs provide a flexible means to regulate discharges subject to the NPDES permitting requirements. The Department, in fact, used BMPs in the general permits listed above as effluent limitations in a flexible and efficient manner. EPA has authorized the use of BMPs in NPDES permits. *See, Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (5 BMP's allowed in NPDES permit for placer mining). Thus, states implementing an NPDES permitting program have the flexibility to develop a general permit for diversions employing BMP's in appropriate circumstances. Such an approach would eliminate the litany of problems that have been predicted.

A final indication of the flexibility afforded by the NPDES permitting program is contained in the statutory definition of "effluent limitation" which provides that:

> "(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical,

[10] Pennsylvania's PAG-13 for MS-4 is consistent with the Ninth Circuit's decision in *Environmental Defense Center v. EPA*, 344 F.2d 832 (9th Cir. 2003) in which the Ninth Circuit remanded EPA's MS-4 general permit option to EPA to address several deficiencies in EPA's MS-4 general permit.

> physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, *including schedules of compliance*."

33 U.S.C. § 1362(11) (emphasis added") The statutory definition of "schedule of compliance" authorizes a schedule of remedial measures leading to future compliance. 33 U.S.C. § 1362(17). *See* also 40 CFR § 122.47. Thus, the NPDES permit program expressly authorizes flexible schedules of compliance containing a schedule of remedial measures that lead to future compliance with the effluent limitations in NPDES permits. Such flexibility is available in situations where additional time is needed to achieve compliance, such as restoring the water quality of the Everglades.

Thus, the NPDES permit program provides a flexible, efficient and effective means to permit various categories of discharges.

D. Recent amendments to Florida state law highlight need for enforceable NPDES permit to protect the environment.

Pennsylvania's experience in requiring an NPDES permit for diversions illustrates the meaningful environmental protection provided by the NPDES permit program. To be effective, the means to insure environmental protection need to be enforceable.

Petitioner attempts to minimize the significant and critical importance of a NPDES permit in protecting the environment by asserting the S-9 Pump discharges are already permitted under the Florida Everglades Forever Act, Fla. Stat. § 373.4592(9)(k) and (l) and (10), and that the state permit for the S-9 Pump requires development of strategies to ensure that the facility meets all state water quality standards, including those for phosphorus, by the end of 2006. Petitioner's Brief at page 17. While this statement reflects

Florida state law prior to May 20, 2003, the statement does not recognize that the Florida Legislature enacted two statutory amendments to the Everglades Forever Act (the first amendment became effective on May 20, 2003 and the second became effective on June 10, 2003)[11] that have the effect of extending the June 10, 2006 compliance deadline in the state permit by a decade. The June 10, 2003 amendment to Section 373.4592(10) deleted the following requirement: "By December 31, 2003, the district shall submit to the department a permit modification to incorporate proposed changes to the Everglades Construction Project and the permits issued pursuant to subsection (9). These changes shall be designed to achieve compliance with the phosphorus criterion and the other state water quality standards by December 31, 2006." Fla. Stat. § 373.4592 (10)(b). The statutory deadline for compliance is now in 2016. Without an enforceable NPDES permit requirement, there is no enforceable legal mechanism to assure that discharges from the S-9 Pump will ever meet the state water quality standards that are necessary to protect the Everglades. The state water quality permit for discharges from the S-9 Pump is subject to change, as recent statutory amendments confirm, and it provides no real enforceable means to assure timely compliance with state water quality standards. In contrast, in Pennsylvania there would be an enforceable NPDES permit in place to provide for meaningful environmental protection of state water quality standards.

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[11] *See*, Fla. Stat. § 373.4592(9)(k) and (l) and (10), as amended. In particular, the amendments created a two-phase long-term plan. The initial phase of the long-term plan is for an initial 13-year phase (2003-2016) and a second ten-year phase. The 2016 deadline for the initial phase is ten years longer than the original language. *See* Fla. Stat. § 373.4592(3), *as amended*, creating the Everglades Long Term Plan. The deadline in Section 373.4592(10) authorizing Long-Term Compliance permits is now limited to "Pre-2006 Projects and Strategies of the Long-Term Plan."

III. THE UNIQUE FACTS OF THIS CASE PROVIDE AN INDEPENDENT BASIS TO AFFIRM THE ELEVENTH CIRCUIT'S DECISION.

The Commonwealth of Pennsylvania supports the analysis adopted by the Eleventh Circuit in this case because it is consistent with longstanding Pennsylvania state case law as well as the Clean Water Act. The Eleventh Circuit did not, however, have to decide the case solely on the basis that it did because the unique facts of this case provide an independent basis to impose an NPDES permit requirement on the S-9 Pump discharge from the C-11 (drainage) Canal. The facts, as set forth by Petitioner and others, establish that the C-11 (drainage) Canal collects and channels runoff from the C-11 Basin within the meaning of EPA's regulations defining "discharge of a pollutant" thereby triggering an NPDES permit requirement for the S-9 pumped discharge. The water in the C-11 (drainage) Canal includes runoff from the C-11 Basin that is "collected and channeled by man." 40 CFR § 122.2.

The Petitioner has jurisdiction over and provides comprehensive water management for the regional South Florida ecosystem. That ecosystem is an immense, integrated and unique system of hydrologically connected surface and ground waters extending over 15,000 square miles. The dominant feature of this unique area is the Everglades, a wetlands system that once encompassed southern Florida. To accommodate human habitation, the State of Florida and the United States, through the Army Corps of Engineers, have constructed elaborate projects that have drained portions of the Everglades and altered the natural flow of the water. While water once moved in a slow, unimpeded sheet from Lake Okeechobee through the Everglades to the sea, it is now directed through drainage canals and related facilities away from heavily populated areas in Broward and Dade Counties.

The petitioner is the local sponsor of the Corps' Central and Southern Florida Project (CCSF Project). The CCSF Project was a "comprehensive plan of improvement designed to remove excess water from urban, pasture and farm lands, to conserve water for control of groundwater levels during dry periods, and to prevent overflow of coastal areas by waters from the Everglades."

This case involves several CCSF Project components. The component consisting of the C-11 (drainage) Canal collects and channels "excess" or "accumulated" water from the C-11 Basin and transports this "excess" or "accumulated" water to the water conservation area WCA-3A in the remaining portions of Everglades by means of the S-9 Pump. The C-11 (drainage) Canal collects and channels "excess" or accumulated" water including surface runoff from C-11 Basin.

The Corps initially constructed the C-11 (drainage) Canal to drain the wetlands in the Everglades and allow development of Broward County. Later the Corps built the two north-south levees, L-33 and L-37 that form the western boundary of C-11 Basin. To allow development and human habitation, the C-11 (drainage) Canal drains the water in the C-11 Basin below levels in the undeveloped wetland areas west of the levees in WCA-3A. The S-9 Pump is needed to maintain the water level in the C-11 Basin below that of the undeveloped area. The water in C-11 (drainage) Canal includes surface runoff from the C-11 Basin that is "collected and channeled by man." This runoff from the C-11 Basin contains pollutants (such as phosphorus) originating from agricultural, residential and other land uses. This phosphorus originates from various point and nonpoint sources that drain into the C-11 (drainage) Canal.

A. EPA's NPDES regulations specifically address surface runoff that is collected or channeled by man.

Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant" into navigable waters from any point source without an NPDES permit. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined by statute as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). EPA has promulgated a regulatory definition of "discharge of any pollutant" at 40 CFR § 122.2 that, *inter alia*, provides several examples of situations that fit within the definition of "discharge of a pollutant" requiring an NPDES permit. One of the examples in Section 122.2 is directly applicable in this case as the definition of "discharge of a pollutant" therein provides in part that:

> . . . This definition includes additions of pollutants into waters of the United States from: *surface runoff which is collected and channeled by man*; . . .

40 CFR §122.2 (emphasis added). The C-11 (drainage) Canal collects and channels runoff from the C-11 Basin[12] that is discharged from the S-9 Pump that is a point source. Thus, this arrangement fits within the express terms of EPA's regulatory definition of "discharge of a pollutant" and requires an NPDES permit.

The Ninth Circuit in *Committee to Save Mokelumne River v. East Bay Municipal Utility District et al*, (13 F.3d 305) (9th Cir. 1993), *cert denied*, 513 U.S. 873 (1994) applied EPA's regulatory definition of "discharge of a pollutant" in a situation involving "surface runoff which is collected or channeled by man." In that case surface runoff from an

[12] The runoff includes associated seepage from adjoining areas in WCA-3A where the water is maintained at higher levels.

abandoned mine site was "collected and channeled" by a utility defendant. This drainage collected in a dam reservoir where from time to time it passed over a spillway into the Mokelumne River. The Ninth Circuit Court distinguished the *Gorsuch* and *Consumer Power Co.* decisions, involving dams and dam-induced pollution, because the source of the pollution in the Mokelumne River was surface runoff that was collected or channeled by defendants from an abandoned mine site. *Committee to Save Mokelumne River*, 13 F.3d at 208-209. The Ninth Circuit applied EPA's regulatory definition at 40 CFR § 122.2 (definition of "discharge of a pollutant") to hold that defendants were subject the NPDES permit requirements for the discharge of the surface runoff from the mine site that it collected and channeled. *Id.*

B. The C-11 (drainage) Canal is a man-made drainage canal that collects and channels runoff from the C-11 Basin.

The analysis in *Committee to Save Mokelumne River* is applicable in this case. The only difference is the size of the man-made effort to collect and channel surface runoff. The enormous scale of drainage of a 105 square mile portion of the Everglades wetlands within the C-11 Basin by the C-11 (drainage) Canal should not change or cloud the analysis or outcome. The man-made C-11 (drainage) Canal drains a large portion of the Everglades wetlands to allow human habitation. The seepage that is collected and channeled by SFWMD in the C-11 (drainage) Canal is directly related to the runoff and is an integral part of the drainage that is collected. The water level in C-11 Basin is only maintained by draining the runoff and related seepage by means of the C-11 (drainage) Canal and pumping the "excess" water or "accumulated" water from the S-9 Pump to the WCA-3A area.

The man-made C-11 (drainage) Canal is so large and extensive that it is itself a protected Class III surface water for recreation and propagation and maintenance of fish and wildlife. Fla. Admin. Code § 62.302-400. It, however, remains a man-made structure primarily designed to collect and channel runoff and related seepage. As a man-made structure that collects and channels surface runoff, a discharge from the C-11 (drainage) Canal is subject to the express terms of EPA's NPDES regulations as a discharge of a pollutant requiring an NPDES permit. Thus, the S-9 pumped discharge from this large scale C-11 (drainage) Canal is subject to the NPDES permit program under the express terms of EPA's regulations.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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